Table of Contents.

Citation to opinion	1
Jurisdiction	2
Questions	2
Statutes	2
Statement of case	2
Arguments and contentions Zoning regulations	3
Conclusion	6
Appendix A	7
Appendix B	13

Table of Authorities Cited.

Cases.

Dobbs v. Board of Appeals of Northampton, 339 Mass. 684	4
Greenburgh v. General Outdoor Advertising Co., (1951 Supp.), 109 N.Y.S. 2d 836	4
Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P. 2d 34	4
Oak Park v. Gordon, 32 Ill. 2d 295, 305 N.E. 2d 464	4
Grant v. Baltimore, 212 Md. 301, 129 A, 2d 363	4
McKinney v. Riley, 105 N.H. 249, 197 A, 2d 218	5
Schroeppel v. Spector, 43 Misc. 2d 290, 251 N.Y.S. 2d 233	5
Smith Auto Company, 57 Munic. L.R. 188, 79 York Leg. Rec. 145, 423 Pa. 493, 223 A. 2d 683	5

STATUTES, ETC.

United States, Constitution, Fourteenth Amendment
28 U.S.C. 1257 (2) 2
G.L. c. 40A, § 2 2, 3
G.L. c. 93, § 29 2

MISCELLANEOUS

Municipal Corporation, McQuillin, 3d Ed. 1965, revised Volume 8A, § 25 to 201 5

Supreme Court of the United States.

OCTOBER TERM, 1970.

No.

DOMINIC STRAZZULLA,
Petitioner,

v.

BUILDING INSPECTOR OF WELLESLEY ET AL.
Respondents.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT.

Dominic Strazzulla appeals from a judgment of the Supreme Judicial Court of Massachusetts.

Citation to Opinion.

The opinion of the Supreme Judicial Court reported at Mass. Adv. Sh. (1970) 1013, dated June 16, 1970, is printed in Appendix "A" hereto.

Jurisdiction.

The jurisdiction of the Court is invoked under 28 U.S.C. 1257 (2) to appeal the judgment of the Supreme Judicial Court dated June 16, 1970.

Questions.

1. Does the Fourteenth Amendment of the Constitution of the United States prevent a city or town from enacting a zoning by-law or ordinance, limiting the use of property?
2. Does the Fourteenth Amendment of the Constitution of the United States prevent a city or town from enacting a zoning by-law or ordinance that regulates the use of property?
3. Is Massachusetts G.L. c. 40A, § 2, unconstitutional under the Fourteenth Amendment of the Constitution of the United States in that it limits and regulates the use of property?
4. Is Massachusetts G.L. c. 93, § 29, unconstitutional under the Fourteenth Amendment of the Constitution of the United States in that it limits and regulates use of property?

Statutes.

The Fourteenth Amendment of the Constitution of the United States, Massachusetts G.L. c. 40A, § 2, and chapter 93, § 29, are printed in Appendix "B." The pertinent sections of the zoning by-law of the Town of Wellesley are set forth in the decision of the Massachusetts Supreme Court (see Appendix "A").

Statement of the Case.

The petitioner operated a cleaning and laundry business at 181 Linden Street in a business district in the Town of Wellesley and in 1963 sold the business.

The roof sign advertising the business was a nonconforming sign in that it was constructed before the adoption of the town by-law regulating such signs. At the time of the sale the purchaser relettered the sign to read "Wrights Laundry and Dry Cleaners" and thereafter, on January 1, 1964, the petitioner repossessed the business. The petitioner filed an application for a permit to reletter the sign "Linden Cleaners—Shirts—Laundry—Storage." Said application was denied. In 1968 a portion of the sign was blown down, whereupon the petitioner replaced the plastic face on the sign with the lettering "Linden Cleaners, Shirts, Laundry, Storage." It was the opinion of the Massachusetts Supreme Judicial Court that advertising on private property could be regulated and restricted by statute and that the statutory language as set forth in Massachusetts G.L. c. 40A, § 2, authorized a town to regulate signs erected on private property. The Supreme Judicial Court concluded that the Board of Appeal of the Town of Wellesley acted within its authority in refusing to allow the petitioner to reletter the sign.

Arguments and Contentions.

Zoning Regulations.

It is respectfully suggested that the refusal of the relettering of an existing nonconforming sign which is no larger and represents no change in business or change in location is an arbitrary limitation of the business enterprise.

This is an opportunity to set guidelines as to nonconforming uses.

The sign in question was never abandoned, for the only contemplated change or alteration was in the lettering or legend that appeared on its face. It would appear that

some guideline is necessary to determine at what point an exercise of regulating power constitutes a deprivation of due process.

The size of the sign in question remains the same, the business enterprise was the same and, in fact, the only change was the words that appeared on the sign.

There is nothing in the record that indicates an intention on the part of the petitioner or his successors or predecessors to abandon the sign by any overt act. (*Dobbs* v. *Board of Appeals of Northampton*, 339 Mass. 684).

An exhaustive note on nonconforming uses and their amortization is to be found in 22 A.L.R. 3d, page 1134.

The matter that emerges from this discussion which appears to be most pertinent to our problem is that it has been held that the burden of proof is on the community to prove that any applicable public benefit will result on the application of the provision.

> *Greenburgh* v. *General Outdoor Advertising Co.* (1951 Supp.), 109 N.Y.S. 2d 826.

It is also the theory of the writer of the note, which theory appears to be supported throughout the country, that the test used by courts in determining whether a provision for the amortizing for nonconforming uses is reasonable is based upon a balancing of the public gain against the private loss. They cite the following cases, which are not directly in point here but support the general rule announced above:

> *Los Angeles* v. *Gage* (1954), 127 Cal. App. 2d 442, 274 P. 2d 34.
>
> *Oak Park* v. *Gordon* (1965), 32 Ill. 2d 295, 205 N.E. 2d 464.
>
> *Grant v. Baltimore* (1957), 212 Md. 301, 129 A. 2d 363.

McKinney v. *Riley* (1964), 105 N.H. 249, 197 A. 2d 218.

Schroeppel v. *Spector* (1963), 43 Misc. 2d 290, 251 N.Y.S. 2d 233.

The interesting and most relevant case had to do with flashing signs.

In *Smith Auto Co.* (1965, Pa.), 57 Munic. L.R. 188, 79 York Leg. Rec. 145, revd. on other grounds, 423 Pa. 493, 223 A. 2d 683, a township zoning ordinance provision requiring that the flashing feature of lights on certain signs in all zones be terminated, so that they would either shine continuously or be extinguished, was upheld, the court finding implicit authorization for the amortization of nonconforming uses in the state zoning enabling legislation for second class townships The right to termination of particular nonconforming uses, the court said, will have to continue to be fought out on a case-by-case basis in the light of the particular structure, use, location, cost, public effect, period of use and amortization period involved—in view of the conflict of the philosophies of private rights against public benefits.

The sign owner in this case can find no Massachusetts case which deals with this subject directly but, based on the prevailing thought throughout the country, would summarize by saying that the private loss here outweights any public gain and that the burden to show any benefit to the public has not been sustained in any way.

Municipal Corporations, McQuillin 3d Ed. 1965 Revised Volume 8A, §§ 25 to 201.

Conclusion.

It is submitted that the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts is in error and that the statute here involved, as applied in these circumstances, is repugnant to the Constitution of the United States. Appellant respectfully urges this Honorable Court to note probable jurisdiction and set this case down for a plenary hearing on the merits.

Respectfully submitted,

WILLIAM DOYLE,
28 State Street,
Boston, Massachusetts 02109,
Attorney for Appellant.

Of Counsel:
MARK E. GALLAGHER,
ROBERT J. BLUMBACK.

Appendix "A."

Massachusetts Advance Sheets (1970), Pages 1013-1017.

DOMINIC STRAZZULLA vs. BUILDING INSPECTOR OF WELLESLEY & ANOTHER.

SPALDING, J. This is a bill in equity by way of appeal from a decision of the board of appeal of Wellesley (board) refusing the plaintiff a special permit to reword a sign located on his premises. The judge made findings of material facts. The evidence is reported.

The facts, which are undisputed, may be summarized as follows. The plaintiff had operated a cleaning and laundry business at 181 Linden Street, Wellesley (a business district), until he sold the business in 1963 to one Wright. An oval sign, four by twelve feet, which had been erected over the roof of the business, had been relettered by the purchaser to read, "Wright's Laundry & Dry Cleaners." On January 1, 1964, due to Wright's failure to meet his financial obligations under the agreement of sale, the plaintiff repossessed the business. At that time he filed an application for a permit with the town building inspector to reletter the sign, "Linden Cleaners-Shirts-Laundry-Storage." The building inspector refused the permit on the ground that the zoning by-law prohibited any alteration of a nonconforming sign, which this sign was, since it was constructed before the adoption of the by-law. On application to the board for the special permit, it was denied after hearing. On August 30, 1966, the plaintiff, having removed the word "Wright's" from the sign, again requested a permit from the building inspector to alter the sign as previously requested. The permit was refused, and the plaintiff again applied to the board for a special permit, which again was

denied. The plaintiff brought this bill in equity by way of appeal under G. L. c. 40A, § 21, from the board's decision.

In 1968 the "plastic face" of the sign was blown away leaving the steel frame and electrical connections exposed. The plaintiff, notwithstanding the board's previous decision, had the plastic facing replaced with the new lettering "Linden Cleaners, Shirts, Laundry, Storage." In the Superior Court a decree was entered annulling the decision of the board and adjudging that the plaintiff was not in violation of the zoning by-law in having relettered the sign as he did.[1] From this decree the defendants appealed.

A committee appointed at the 1961 town meeting to study the regulation and control of advertising signs concluded that special regulation of signs was needed, including "the prohibition of any roof signs." To the zoning by-law was added in 1963 § XXIIA including an article regulating "accessory signs."[2] The regulations required such a sign to be parallel or perpendicular with a wall of the building, but "shall not project . . . above the top of the wall to which it is attached. Roof signs are not permitted . . . ." Nonconforming signs legally erected prior to the adoption of that section (the sign in question) "may be continued to be maintained but shall not be . . . reworded . . . redesigned or altered in any way unless it is brought into conformity. . . . The exemption herein granted shall terminate with respect to any sign which . . . shall have been abandoned." Part E of § XXIIA authorizes the board to grant a special

[1] The judge rested his decision on the grounds (1) that the by-law involved was invalid, and (2) that in any event the board's refusal of the permit was "arbitrary, capricious and illegal."

[2] An accessory sign is defined in Part B of § XXIIA as any sign that advertises or indicates "the person occupying the premises or the business transacted on the premises . . . and which contains no other advertising matter."

permit for a sign not complying with the foregoing provisions if it determines that the sign will be in harmony wth the general purpose and intent of § XXIIA, and will not be injurious to the neighborhood or to traffic and safety conditions, or otherwise detrimental to the public safety and welfare.

The gist of the defendants' argument is that the sign by-law was valid by virtue of powers granted by G. L. c. 93, § 29, and G. L. c. 40A, §§ 2 and 3, and art. 89 of the Amendments to the Massachusetts Constitution. They argue further that the denial of a special permit to alter the sign was, in the circumstances, justified and within the board's powers.

There can be no doubt now that advertising on private property may be regulated and restricted by statute. Article 50 of the Amendments to the Massachusetts Constitution. *General Outdoor Advertising Co. Inc.* v. *Department of* Pub. Works, 289 Mass. 149, 158-161. And it is within the General Court's power to delegate this regulatory authority to a State agency or the municipalities as it deems appropriate. *Milton* v. *Donnelly,* 306 Mass. 451, 455. This court has held that the antecedent statute to the present c. 40A, § 2, c. 40, § 25, which delegated authority to municipalities to enact zoning ordinances or by-laws, was broad enough to permit the regulation of professional signs on residential premises. *Lexington* v. *Govenar,* 295 Mass. 31, 36.

Likewise we believe that the present statutory language authorizes a town to regulate signs erected on private property.[3] Chapter 40A, § 2, permits regulation by zoning ordinance or by-law of "the location and *use of* buildings, *structures* and land for trade . . . or other purposes . . .

[3] In view of this conclusion, it is unnecessary to decide whether art. 2 of the Amendments to the Constitution, as amended by art. 89, commonly called the Home Rule Amendment, obviates the necessity for such enabling legislation.

[W]ithin [particular] districts . . . [the zoning ordinance or by-law] may regulate and restrict the erection, construction, *reconstruction, alteration* or use of buildings, and *structures*, or use of land . . ." (emphasis added). We are of opinion that Wellesley is authorized by this language to regulate the location, size, color, material, and informational content of a sign such as this "accessory sign." And reading this language in conjunction with c. 40A, § 5, which authorizes a municipality to regulate nonconforming structures "so as not to unduly prolong the life of nonconforming uses," we are convinced that Wellesley has the power to specify the conditions necessary for or limitations on changes in a nonconforming sign. Finally, the prohibition contained in § XXIIA against changes in nonconforming signs unless they conform to the by-law requirements would appear designed "to conserve the value of land and buildings; to encourage the most appropriate use of land . . . [in the town]; and to preserve and increase its amenities," purposes included in c. 40A, § 3, as appropriate objectives of zoning regulations.

We turn to the issue whether the board acted in accordance with the enabling act and the zoning by-law. Neither c. 40A, § 4, nor § XXIIA of the by-law gives a landowner an absolute right to a special permit for a nonconforming use. Part E of that section authorizes the board to grant a special permit for a nonconforming sign "if it determines that the particular sign will be in harmony with the general purpose and intent of this section . . ." However "[t]he board is not compelled to grant a permit. It has a discretionary power. . . . The decision of the board can be disturbed only if it is based on 'a legally untenable ground' . . . or is 'unreasonable, whimsical, capricious, or arbitrary.'" *Gulf Oil Corp.* v. *Board of Appeals of Framingham*, 355 Mass. 275, 277.[a] *Zaltman* v. *Board of Appeals of Stoneham*, Mass. , .[b]

---

[a] Mass. Adv. Sh. (1969) 193, 195.

[b] Mass. Adv. Sh. (1970) 755, 757.

In its November 15, 1966, decision, the basis of this appeal, the board denied the plaintiff's request because to do otherwise "would derogate from the general purpose and intent of Section XXIIA of the Zoning By-law." Such a conclusion is not unreasonable since the purpose of that section is to bring signs into some pattern of uniformity and to phase out nonconforming signs. It was open to the board to conclude that the allowance of the plaintiff's application would have been a subversion of that policy. We are of opinion that, contrary to the conclusion of the trial judge, the board's decision denying the special permit was not arbitrary or capricious, nor was it based on an untenable legal ground.

The final decree is reversed and a decree is to be entered that the decision of the board is within its authority; that no modification of its decision is required; and that the clerk of the court within thirty days after the entry of the decree send an attested copy thereof to the board.

So ordered.

Appendix "B."

Fourteenth Amendment of the Constitution of the United States.

Article XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts G.L. c. 40A, § 2.

Section 2. For the purpose of promoting the health, safety, convenience, morals or welfare of its inhabitants, any city except Boston, and any town, may by a zoning ordinance or by-law regulate and restrict the height, number of stories, and size of buildings and structures, the size and width of lots, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population and the location and use of buildings, structures and land for trade, industry, agriculture, residence or other purposes; provided, however, that no ordinance or by-law which prohibits or limits the use of land for any church or other religious purpose or for any educational purpose which is religious, sectarian, denominational or public shall be valid; and provided, further, that in regulating or restricting the size of such buildings

or structures no provision of any ordinance or by-law shall be valid which requires the floor area of the living space of a single-family residential building to be greater than seven hundred and sixty-eighty square feet.

For any or all of such purposes a zoning ordinance or by-law may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this chapter, and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, and structures, or use of land, and may prohibit noxious trades within the municipality or any specified part thereof. All such regulations and restrictions shall be uniform for each class or kind of buildings, structures or land, and for each class or kind of use, throughout the district, but the regulations and restrictions in one district may differ from those in other districts. Due regard shall be paid to the characteristics of the different parts of the city or town, and the zoning regulations in any city or town shall be the same for zones, districts or streets having substantially the same character. A zoning ordinance or by-law may provide that lands deemed subject to seasonal or periodic flooding shall not be used for residence or other purposes in such a manner as to endanger the health or safety of the occupants thereof.

Massachusetts G.L. c. 93, § 29.

Section 29. The outdoor advertising board, herein and in sections twenty-nine A, thirty A, and thirty-one called the board, may make, amend or repeal rules and regulations for the proper control and restriction of billboards, signs and other advertising devices, except as provided in section thirty-two, on public ways or on private property within public view of any highway, public park

or reservation. Such rules and regulations may require that said billboards, signs or other devices be located in business, commercial, industrial, marketing or mercantile areas, or on unrestricted commercial arteries and adjacent to commercial enterprises: may prescribe standards of size, setback and clearance, considering the public interest; may require said billboards, signs or other devices to be licensed by the board by the issuance of permits in accordance therewith and with this section; and may prescribe permit fees, to be fixed with regard to the cost of administering this section, and said fees need not be uniform throughout the commonwealth. No permit, whether permanent or temporary, for a billboard, sign or other advertising device shall be issued unless written notice of the application theefor stating the proposed location shall have been given at least thirty days earlier to the city or town in which the proposed billboard, sign or other advertising device is to be located. The board shall delegate to the executive director authority to issue licenses or permits, subject to the provisions of section twenty-nine A, where no objection has been received to the pending application. Except as hereinafter provided, before establishing or amending rules and regulations under this section, the board shall hold duly advertised public hearings in Boston and in such other cities and towns within the commonwealth as it deems necessary or expedient. Cities and towns may further regulate and restrict said billboards, signs or other devices within their respective limits by ordinance or by-law, not inconsistent with sections twenty-nine to thirty-three, inclusive, or with said rules and regulations.